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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 62

FIRST NATIONAL BANK OF CINCINNATI and INTERNATIONAL HEATER COMPANY,

Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.

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BRIEF OF PETITIONER FIRST NATIONAL BANK OF CINCINNATI IN REPLY TO BRIEF OF RESPONDENTS REORGANIZATION COMMITTEE.

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First National Bank of Cincinnati.

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The brief of these respondents under the title "Statement of the Case" at page 2 says that: "Respondents do not consider it necessary to include in their brief any statement of the case beyond the following corrections of inaccuracies and omissions in the statement of the case as set forth in the brief of the petitioner First National Bank of Cincinnati." They then devote their "State-

ment of the Case" (pp. 2-9) to pointing out what they choose to characterize as our "inaccuracies."

In view of this and of the fact that we spared no pains to avoid the making of any inaccurate statements of fact to the Court and that, upon carefully reviewing our brief and the record in the light of the criticism of these respondents, we still find that we have not fallen into any inaccuracies whatsoever, we beg leave of the Court to answer these criticisms and to justify our statement of the facts. For this purpose we will take up the criticisms in the order in which they are made.

They first criticize (p. 2) our statement that the suit resulted in the making of "a perfunctory judicial sale in a manner studiously designed to effectuate a transfer of all of the assets of the corporation to the nominee of the Reorganization Committee." At page 27 of our brief, after briefly analyzing the provisions of the decree in this respect, we put it that "frankness would compel all to admit that the sale was wholly perfunctory and technical." Our analysis at pages 25-27 is incomplete. For the sake of brevity we did not set forth at length all the facts which help to drive home the inevitable conclusion that the decree was studiously devised and constructed for such purpose. We referred, and refer the Court again, particularly to the provisions of the decree contained at pages 300-9 and submit that a reading of these provisions will demonstrate the inevitableness of our conclusion. Since our statement has been challenged as an inaccuracy, however, we direct the Court's special attention to two particular examples of these provisions. At page 303 of the record, there will be found a provision requiring 10% deposit of the upset price twenty-four hours before the time fixed for the sale. This meant that any prospective purchaser (other than a debenture holder)

to have his bid for any parcel mean anything, would have to deposit at least $239,200 in cash, which is 10% of the upset price upon Parcel "A". For, even if he desired only to become the purchaser of, for example, one of the less important parcels, his bid would be conditioned upon all the several bids exceeding any bid that should be made for the property as an enitrety, so that in order to acquire what he might wish to own he would have to be prepared finally to bid for the property as an entirety. None of these difficulties applied to the Reorganization Committee who were permitted to use debentures in lieu of cash. Another provision which is found at page 306 makes it one of the terms of sale that a purchaser "shall be required to assume all obligations of the Receivers under any then existing executory contracts, leases and agreements entered into, assumed or adopted by the Receivers." This must, it seems to us, keep away other bidders than the Reorganization Committee. These are merely particular examples illustrating the point which for the sake of brevity was not fully eluc dated in our main brief. And again, for the sake of brevity we let the matter rest by pointing out to the Court that this part of the decree has to be carefully read as a whole in order fully to see its true significance.

The next criticism (p. 3) is of our statement made at page 3 of our brief that "the same interests as those sponsoring the reorganization represented the corporate assets as having a value of approximately $25,000,000," and they refer to statements in a different form but to similar effect which appear at pages 10, 34 and 47 of our brief. We again call the Court's attention to the fact that the bankers' circular (R. 269-80), which contained the representation that the assets in 1927 had a value of approximately $25,000,000, emanated from the banking

houses of issue and from the corporation. The statement, in the usual way in such documents, incorporated a letter signed by the Chairman of the Board of the corporation, Mr. John H. Waters. One of the two banking houses of issue was the Trustee under the Indenture. The record also shows that the Reorganization Committee was set up as a result of a meeting of the Board of Directors of the corporation (R. 499-502), of which Mr. John H. Waters was then the Chairman, and that he is a member of the Reorganization Committee, and that the same trust company which served in the capacity of the banking house of issue and Trustee under the Indenture is serving as depositary under the Plan of Reorganization. Throughout the activities of accomplishing the Plan and in the suit, we find the management, the Reorganization Committee and the Trustee all cooperating for the same purpose. In this Court we find the Reorganization Committee and the Trustee, although filing separate briefs, both joining in defense of the proceedings below and of the Plan.

Our statement which they next challenge (p. 3) is that the Plan was "for the benefit of debenture holders and preferred and common stockholders." We direct the Court's attention to the Plan and point out that it provides (R. 41) that the preferred stockholders are entitled to exchange their shares for common shares of the new company unconditionally,—that is to say, without the requirement of their contributing anything by way of new capital. At this point, page 3 of their brief, they refer to: "the option given to the common stockholders to acquire a minority interest in the equity by putting up a substantial amount of new money." It should be noted that the common stockholders were not required presently to put up a substantial sum of money. If, in fact, all of

the common stockholders should exercise the privilege of acquiring the right to subscribe the aggregate amount presently payable for such privilege would be but $90,569 (R. 37, 41). Manifestly, this could not be fairly characterized as any substantial contribution of new capital justifying the continuation of this business with its history of huge deficits at the risk of the debenture holders' capital.

The next criticism (p. 3) is of our description of the receivership decree as "a decree * * * enjoining suits." The decree in paragraph 6 (R. 66) contains a broad injunction against "* * * all other persons * * * in any manner disturbing or interfering with the possession or management of any part of said property over which said Receivers are hereby appointed." Apparently these respondents interpret the decree as we do for the reason that, when they thought it wise to have the Trustee under the Indenture bring a suit against the corporation after the receivership in order to obtain a consent judgement upon the debentures, they deemed it necessary first to obtain an order from the District Court permitting such suit to be brought (R. 80).

Our statement next challenged (p. 4) is: that "the business as an entirety was a demonstrated failure." They admit that our statement of the fact that a loss of over $4,000,000 was incurred during the years 1928, 1929 and 1930, is correct. They say in extenuation that two of these three years were included in the great economic depression. We think it would be more in accord with the fact to say that one of them was. The years 1928 and 1929 are both fairly to be regarded as excellent business years. They say further that building construction was on the decline and that their line of business was therefore depressed. But it is fair to point out that

Mr. Cahn, who is one of the Reorganization Committee and one of the respondents, publicly stated when acting as a member of the opposition committee that "During the last three years, competitor companies, under better management, have earned substantial profits" (R. 385). The fundamental explanation of the deficits, we believe, is found in the following: The Vice-President and General Manager Robert S. Waters, when cross-examined upon the explanation of the fact that, although the profits of the first four months of the corporation's life, viz. September-December 1927 were rather handsome, the operations thereafter showed large deficits, said at pages 191-2:

> "A. I would say that it was due largely to the result of the consolidation, which meant that the new corporation could not continue to handle the type of business that was done by two of the predecessor corporations. In other words, the Niagara Radiator & Boiler Company and the Continental Heater Company business was largely made up of what they call mail order business and some 'direct to you' business, as they refer to it in the trade; whereas the other companies, particularly the National Radiator Company, sold direct to the heating contractor and the jobber. And that type of business handled by Niagara and the Continental, they simply had to give that up.
>
> Q. Why did you give up a business that was so lucrative that it would make $900,000 in one-third of a year, for the purpose of conducting business in such a fashion as to produce over a million dollars of loss?
>
> A. I have explained to you that the corporation couldn't carry water on both shoulders, that two of the units, two of the predecessor com-

panies, did a kind of business that could not be carried out by the consolidated corporation.

Q. Well, you carried the water on both shoulders for four months. Is that right?

A. We did.

Q. And you made $900,000 doing it; and then you let the water go off one of the shoulders, and since then you have been making losses of over a million and a half?

A. We were obliged to give up that class of business, yes.

Q. Obliged by what?

A. Customs of the trade; the jobbers and heating contractors, or so-called legitimate trade."

This, we submit is rather a conclusive demonstration of the fact that the business as an entirety was a failure; that the merger was an ill-conceived one; and that this reorganization of the business as an entirety was an ill-conceived reorganization. This does not mean, however, that all the values were destroyed or that more could not be salvaged from the situation than the cash, plus a very small percentage of the Receivers' accounts receivable and Receivers' inventory. The business of the old National Radiator Company, which was the chief constituent of the merger and for which cash, debentures and other securities aggregating $13,000,000 (R. 254) were issued upon the organization of the defendant corporation, had been a profitable enterprise. Intelligent treatment of the situation should have provided for the separation and reconstituting of this business in the Johnstown and New Castle plants as a separate concern. Intelligent effort properly directed might well also have resulted in the reconstitution of some of the other businesses and the use of some of the other plants for such purposes; or,

if not, the numerous and costly plants, warehouses, dwellings, office building, apartment house, etc., could have been divorced and put aside for gradual liquidation with a reasonable prospect of substantial salvage.

At this point (p. 4 of their brief), the respondents abandon for the moment their stated purpose of confining their statement of facts to pointing out our inaccuracies and go into a matter not adverted to in our brief, and they state: that the annual requirements for coupon and sinking fund payments under the Indenture were $1,094,429.50. They do this for the purpose of showing that the cash if used for these purposes would in time be exhausted. But when they thus depart from a criticism of the inaccuracy of our statements and make a statement of their own, we find that they fall into a misleading statement. While it is literally true that, according to the provisions of the Indenture, the annual cash requirements for these purposes were as stated, it is also a fact that these aggregate requirements were made up to the extent of more than $400,000 a year by the sinking fund requirements and that, under the Indenture, debentures could be turned over at their redemption value of 107½% in lieu of cash in satisfaction of the sinking fund requirements (R. 269, 279). It is also a fact that in February 1, 1931,—when, although the corporation then had in its treasury $1,701,899.94 of cash (R. 34), it defaulted in the semi-annual interest payment then due,—it did not default in the semi-annual sinking fund payment then due. This sinking fund payment was apparently satisfied by the turning over to the Trustee of debentures which the corporation had acquired; and it would seem that it had $158,000 of debentures still left (R. 108). The corporation could acquire debentures in the market for about 15% of their

face value and use them for the purposes of the sinking fund at 107½% of their face value. Even assuming that they may not have had in their treasury a fund of debentures sufficient to satisfy several more semi-annual sinking fund requirements, it would nevertheless follow that comparatively little more cash would be required annually to satisfy both their interest and sinking fund requirements than the amount necessary for the former, viz. about $700,000 a year. As a matter of fact, therefore, at the time of the deliberate default in the payment of the interest, there was enough in cash alone to make provision for these requirements for well over another ensuing period of two years.

Coming back to our inaccuracies, they next say (p. 4): "It is not true that 'the respondents, without notice to the creditors, submitted to the District Court the final decree of sale'." They then state that notice was given to all parties to the cause and refer to a record page which shows that the defendant corporation and the Trustee under the Indenture had notice. How can it be suggested that such a notice was equivalent to notice to the creditors? The Trustee was in reality only representing creditors to the extent that such creditors had assented to the Plan. It was sponsoring the Plan and cooperating with the Committee in bringing about its accomplishment and was in reality in opposition to the interests of the dissenting creditors. The real vice suggested in our brief was that notice was not given to the dissenting creditors, which is the only important thing. In fact, notice was not given to the dissenting creditors.

They go on at that point and then say (p. 5) that "In particular, notice was given to counsel for the petitioner First National Bank of Cincinnati although that institution was not at the time a party, and that institution as

an intervener was present by counsel throughout the hearing extending from March 3rd to March 7th, 1932, inclusive, and again at the argument on March 14, 1932." At other points in their brief they reiterate and emphasize the fact that there was such a full hearing and that we had notice and a full opportunity to be heard. The Circuit Court of Appeals also gave much emphasis to this. We think, therefore, the Court should know what happened. As the respondents indicate, this petitioner had just before the hearing filed a petition to intervene (R. 2), to which petition the Reorganization Committee, the defendant corporation and the Trustee all interposed answers (R. 97-101), and the solicitors were informed that this petition for intervention would be made returnable on March 3rd when there was to be a hearing in the suit. Upon March 3rd, counsel for this petitioner attended before the Court in support of the petition. Upon the opening of the hearing, the respondents handed to the Court a printed decree of sale 105 pages long, which counsel for this petitioner had never seen and of which it had never heard. They also marked in evidence voluminous depositions, of which this petitioner's counsel had not the least knowledge and of the taking of which there had been no pretense of notice to us. The respondents had their witnesses in the Court. The stage was all set for obtaining the final decree of sale. But they were to be the sole actors in the drama. They started to put in their evidence and to submit their decree of sale as though we were not in the Court room and they suspended only upon our insistence that we should first be heard upon our application to intervene, which we had come there to argue. This happened on a Thursday, March 3, 1932. The whole morning session was consumed by argument upon behalf of this petitioner upon

its petition to intervene and by the argument in opposition thereto of these respondents. Finally an order was made permitting us to intervene. Their witnesses were then heard during the afternoon of the 3rd and during Friday the 4th, and this intervenor was permitted to cross-examine. The next two days, the 5th and 6th, being Saturday and Sunday, the Court was in recess, but on the 7th the hearing was continued for long enough to take 18 pages of testimony (R. 249-67). Upon the closing of the hearing on the 7th, the Court directed that this petitioner would have one week to file a brief and fixed the 14th for argument. We have gone into this question at some length for the reason that over-statements as to the question of notice and opportunity to be heard and thoroughness and completeness of the hearing, etc. of a similar sort which were made in the briefs of these respondents in the Circuit Court of Appeals resulted in what we believe was a misconception and over-statement by that Court in its opinion as to the facts in this respect. The opinion of Judge Woolsey erroneously speaks of the hearing for taking testimony as lasting four days (R. 536). In fact it lasted about a day and a half.

Next they admit (p. 5) the fact that the Receivers and Reorganization Committee were represented by the same counsel, but point out that this counsel was formally appointed by the District Court. That would almost go without saying, for we believe it is well understood to be a universal practice that receivers apply to the Court for its approval in the selection of counsel. But we submit that this does not cure the duplicity of representation arising from the fact that the Receivers were represented by the same counsel as the Reorganization Committee whose objective was to acquire the receivership assets as cheaply as they could.

Their next criticism (p. 5) is of our reference to an apartment house as one of the assets embraced in the sale. We did not in our brief ascribe any value to this but mentioned it merely as an additional item. It was, however, admitted upon the stand by Mr. Robert S. Waters, who was the Vice-President and General Manager, that the equity in this apartment house was worth at least what it was carried at on the corporation's books, viz. $51,172.31 (R. 217).

They next refer to the National Steel Boiler transaction in the following words (p. 5): "The petitioner refers to the stock of National Steel Boiler Company as an additional asset. The uncontradicted testimony was that this stock had no value whatever." The uncontroverted testimony is, as pointed out in our main brief, that this National Steel Boiler Company was a corporation set up to manufacture steel boilers of a type which was a new departure in the business, from inventions made in the laboratories of the National Radiator Corporation by the officers and employees of that corporation, with capital furnished by the National Radiator Corporation, and that a bare majority of the capital stock was issued to the National Radiator Corporation and the rest of it was issued to a group of its officers who claimed to hold it in their own right (R. 200-3); and that this was referred to in the printed circulars addressed by the Committee to the debenture holders to induce the deposit of debentures in the following words: the corporation "has developed new and improved products of great promise including, among others, steel boilers." This petitioner besought the Court below as well as the Circuit Court of Appeals to undo this seemingly fraudulent transaction or, at least, investigate it further. But these requests were ignored.

At page 6 of their brief they state: "It is not true that the District Court 'did not secure an appraisal and acted only upon the so-called opinion of the purchasers'." They then refer to the inventory which the Receivers have filed to controvert our statement that there was no appraisal. But this inventory showed assets of $11,944,-244.38. Moreover it did not include many important assets. We have not heard these respondents suggest before that this should be treated as an appraisal for the purpose of determining the upset price, although we suggested that, in lieu of any other appraisal, it ought to have been so taken. They then at this point also refer to the testimony of what they claim to be the disinterested witnesses whom they called saying "Two of the witnesses owned no interest in the corporation, two were the Receivers themselves and only one of the witnesses as to value was a member of the Reorganization Committee." The fact is that they called Messrs. John H. Waters, Robert S. Waters, Rudolph B. Flershem and William G. Heiner. John H. Waters (whose testimony on this question was rather slight) was the ranking officer of the corporation and the chief holder of the securities and a member of the Reorganization Committee; Robert S. Waters, his son, is Vice-President, General Manager and also a Receiver; Rudolph B. Flershem is the second ranking officer of the corporation and a member of the Reorganization Committee; William G. Heiner is a Receiver. As above stated, these gentlemen were represented in their capacity as Receivers and in their capacity as Reorganization Committee by the same counsel. They end this up by saying: "In short, the District Court itself made a very full appraisal." We do not know what they mean by that statement. If they mean that there is anything whatever to indicate that the Court did otherwise than

act upon what was put before it by the Reorganization Committee, it is a misstatement.

They next state as follows (p. 7): "The statement is not correct that the Plan provided that 'the rights of the Debentureholders as creditors should as such be cut in half'." We submit that an examination of the Plan (R. 41) will show that this statement is in every sense strictly correct. The Plan provides that for each $1,000 debenture, the debenture holder is to receive $500 in face amount of a debenture of the new company and that the rest of his interest is to be represented by stock. Furthermore these new debentures were "income" debentures (R. 38). The management are put in a position under the Plan to use without interest the money of the debenture holders until the last dollar is wasted.

They next state (p. 7): "The Plan does not contemplate as the petitioner's brief states at page 48, 'the payment of all the creditors excepting only the Debentureholders and the International Heater Company, in full, in cash' and it does not appear from the proceedings below 'that this has been done' and, in fact, they have not been paid." The record shows that these creditors have been paid (R. 462).

They next state that "It is not correct that the fund of $300,000 paid in cash on account of the purchase price was reserved for administration allowances. It is in substantial part to be applied as the distributive dividend against $400,000 or more of claims of creditors (including petitioner) not participating in the reorganization." These provisions of the decree are elaborate and abstruse so that it is difficult for us to know just what they mean, but we gather that, as these respondents construe it, all of the $300,000 is available as administration allowances except to the extent necessary to provide a

distributive dividend to about $400,000 of dissenting creditors. Since the total amount of claims (chiefly debentures and defaulted coupons) aggregate more than $11,500,000 and the amount realized from the assets after administration allowances and possibly deductions for other expenses will amount to not more than a net of say $2,300,000, the percentage for distribution will apparently produce not more than say $75,000 for the non-assenting creditors. That would make a distribution of this $300,000 fund of, say, $225,000 to the Reorganization Committee, Receivers, Trustee and their respective counsel, and, say, $75,000 for the dissenting creditors.

They next state (p. 8) that our comment upon the capital structure of the new company as $16,000,000 is incorrect, and that "Apparently, the petitioner's computation assumes a wholly unwarranted capitalization of $115 per share for the no par value preferred stock and $20 per share for the no par value common stock of the New Company." Our computation does proceed upon such assumptions. We do not think that, in view of the fact that the Plan provides for a liquidating preference value of $115 a share for the preferred stock and ascribes a $20 per share valuation to the common stock for subscription purposes (R. 39, 40), the assumption is wholly unwarranted.

The next charge of inaccuracy (p. 8) is that "It is not true that the result of the decree of sale is to continue the business in the hands of the same management." It is too clear from the whole record that the Plan was originated, sponsored and carried out by and on behalf of the same elements who brought about the organization of the corporation and who have ever since been in control. To quote again from one of the members of the Committee themselves, namely Mr. Cahn, who it is true was

then a member of the opposition committee: "No Correction in Management.—The Plan completely fails to deal with the most vital question of management. The majority of the present Board of Directors were on the Board of Directors when these Debentures were sold to you in August, 1927."

AS TO RESPONDENTS' ARGUMENT:

I

Their first point is that the Court was justified in treating the corporation as imminently insolvent and in making the sequestration decree. We have made no point as to that. This petitioner has intervened and, under Equity Rule 37, we have believed that such intervention is "in subordination to, and in recognition of, the propriety of the main proceeding."

II

Point II is an attempt at justification of the action of the Court in determining the upset price. We have discussed this fully in our main brief.

III

Point III is entitled: "No creditor has a right to piecemeal liquidation." They state that this is the position which we have taken below and here. The position which we have taken in this respect throughout the litigation is set forth at page 25 of our main brief as follows:

> "The decree, we admit, might properly have provided for the sale of all of the assets and properties as an entirety for the purpose of effectuating the plan, *but only if the Court could assure itself beyond preadventure by way of an upset price, fixed upon a thorough and independent investigation, that the net result to the creditors would be at least equal to that obtainable as a result of fair and normal liquidation.*"

The respondents, and we must also say the Courts below, have seemed disposed to avoid the real issues in favor of dealing with fancied ones which seem easier to meet.

IV

In Point IV they deal briefly with our claims as to the propriety of the Plan in that (1) while writing down the interest of creditors, it unconditionally reserves an interest in the stockholders; and (2) it discriminates by paying some creditors of the same class in full in cash while permitting others only to receive the securities of the new corporation, or in lieu thereof to be relegated to the receivership dividend.

At this point they virtually admit that the Plan is defective in these respects and try to justify it by a *de minimis* argument. They say that the extent of the interest unconditionally reserved for the preferred stockholders in the new corporation is comparatively small, and also that the amount of cash paid to the creditors in whose favor the discrimination was made is rather slight. *But the aggregate amount of the interest unconditionally reserved in the preferred stockholders and of the arbitrary discrimination in favor of some of the general*

creditors is large in comparison to the amount of the claims of these dissenting creditors.

Conclusion

In conclusion they say (p. 32): "Not only does the petitioner refuse to take the same thing that the creditors who adhere to the Reorganization Plan are taking, but neither will it take the same thing (viz. a dividend) that the non-assenting creditors are willing to take." This is a strange statement. All know this grossly inadequate dividend was *forced* upon the non-assenting creditors, and it is just for that reason that we are here.

They then say at the bottom of page 32 and the top of page 33: "At the end of its brief it frankly asks for a direction 'that this petitioner have a lien upon the assets' of the New Company 'for the amount of the principal of this petitioner's indebtedness with interest, costs and disbursements including counsel fees'." Apparently they appear to regard this as rather a shock. It would seem that they feel that we are trespassing on their preserves in the suggestion that there should be an allowance for the counsel of this petitioner out of the $300,000 fund which has been reserved. They seem to think that it is in line with the usual procedure and therefore eminently proper that the Reorganization Committee and its counsel and the Trustee and its counsel and the corporation and its counsel should have recourse to this trust fund for their allowances. But as pointed out in our main brief, these parties did not seek a true administration of the trust; but on the contrary, a violation of it. In fact, the only party to the cause who has advocated or defended the interests of the creditor-beneficiaries is this petitioner.

They close at page 33 with the statement "Equality is equity and this petitioner does not seek equality but a preference. No creditor has a vested right to preferential payment." But we point out again that, under their Plan, they have preferred to us some of the creditors of the same class by payment in full in cash; also that, while reducing the position of the other creditors, including this petitioner, by half, they are reserving an interest in the corporate property in the stockholders whose rights are wholly subservient to those of creditors.

We again ask for the relief asked for at the conclusion of our main brief.

Respectfully submited,

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